No. 91-615 (25)

IN THE
Supreme Court of the United States
OCTOBER TERM, 1991

ALLIED-SIGNAL INC.,
as successor-in-interest to
The Bendix Corporation,
Petitioner,
v.

DIRECTOR, DIVISION OF TAXATION,
Respondent.

On Writ of Certiorari to the Supreme Court of New Jersey

BRIEF OF AMICI CURIAE AMWAY CORPORATION, ASEA BROWN BOVERI, INC., ASHLAND OIL, BORDEN, INC., AND THE LIMITED STORES IN SUPPORT OF PETITIONER ON REARGUMENT

TIMOTHY B. DYK
Counsel of Record
BETH HEIFETZ
EDWARD K. BILICH
JONES, DAY, REAVIS & POGUE
1450 G Street, N.W.
Washington, D.C. 20005-2088
(202) 879-3939

DAVID E. COWLING
JONES, DAY, REAVIS & POGUE
2300 Trammell Crow Center
2001 Ross Avenue
Dallas, Texas 75201
(214) 220-3939
Counsel for Amici Curiae

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

35

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

TABLE OF AUTHORITIES—Continued

TABLE OF AUTHORITIES—Continued

TABLE OF AUTHORITIES—Continued

TABLE OF AUTHORITIES—Continued

IN THE

Supreme Court of the United States

OCTOBER TERM, 1991

No. 91-615

ALLIED-SIGNAL INC.,
as successor-in-interest to
The Bendix Corporation,
Petitioner,

v.

DIRECTOR, DIVISION OF TAXATION,
Respondent.

On Writ of Certiorari to the Supreme Court of New Jersey

BRIEF OF AMICI CURIAE AMWAY CORPORATION, ASEA BROWN BOVERI, INC., ASHLAND OIL, BORDEN, INC., AND THE LIMITED STORES IN SUPPORT OF PETITIONER ON REARGUMENT

STATEMENT OF INTEREST [1]

Amici are multistate and multinational companies that are engaged extensively in interstate commerce. These companies, although representing different industries, have an interest in avoiding duplicative, burdensome, and discriminatory state taxation, and in the orderly development of the law in this area.

---

[1] The parties' letters of consent have been filed with the Clerk pursuant to Rule 37.3 of this Court.

Amici did not file a brief in this case when it was first argued, and have not now briefed the question of how this case should be resolved under this Court's settled case law. However, they oppose New Jersey's position in this case that the Court should dispense with the unitary business principle and overrule *ASARCO v. Idaho State Tax Comm'n*, 458 U.S. 307 (1982), and *F. W. Woolworth Co. v. Taxation & Revenue Dep't*, 458 U.S. 354 (1982).

INTRODUCTION AND SUMMARY OF ARGUMENT

In the area of state taxation, the protections of the Commerce Clause and the Due Process Clause are nearly identical.[2] As this Court summarized in *Complete Auto Transit, Inc. v. Brady*, 430 U.S. 274, 279 (1977), the constitutional requirements are satisfied if "the tax is applied to an activity with a substantial nexus with the taxing state, is fairly apportioned, does not discriminate against interstate commerce, and is fairly related to the services provided by the State." This test, although formulated to meet Commerce Clause standards, "encompasses as well the Due Process requirement that there be 'a minimal connection between the interstate activities and the taxing State, and a rational relationship between the income attributed to the State and the intrastate values of the enterprise.'" *Trinova Corp. v. Michigan Dep't of Treasury*, 111 S. Ct. 818, 828 (1991) (quoting *Mobil Oil Corp. v. Commissioner of Taxes*, 445 U.S. 425, 436-37 (1980) (internal quotations omitted)).

This case implicates two of those requirements: nexus and fair apportionment. But underlying both of those requirements is the central purpose of the Commerce Clause—to prevent discrimination against interstate com-

[2] *See Trinova Corp. v. Michigan Dep't of Treasury*, 111 S.Ct. 818, 828 (1991); *Mobil Oil Corp. v. Commissioner of Taxes*, 445 U.S. 425, 443 (1980); *Amerada Hess Corp. v. Director, N.J. Div. of Taxation*, 490 U.S. 66, 80 (1989) (Scalia, J., concurring).

merce. Where a state seeks to tax values beyond its borders, either by allocating income to the state as to which there is no nexus or by unfair apportionment, there is a risk that the state may be discriminating against interstate commerce in two ways.

To begin with, the taxing state may be seeking to eliminate a competitive advantage enjoyed by another state that has determined to attract interstate businesses through a lower tax rate or a narrower tax base. For example, a state seeking to encourage business within its borders may choose to exempt from taxation certain kinds of passive income of corporations having their commercial domicile in the state. This Court only last Term made clear the legitimacy of a state tax policy designed to attract such business,[3] and the threat to such competition posed by extraterritorial taxation is obvious. If other states can tax income that is not rightfully subject to their jurisdiction or tax a disproportionate share of income, any advantage conferred by the low-tax state would be, at the very least, substantially diluted.

Additionally, the taxing state may in fact be discriminating against interstate commerce by creating a taxing scheme that, while facially neutral, imposes disproportionate burdens on interstate business. A state tax formula that is "significantly out of line" with the practices in other states may in fact be designed to discriminate against out-of-state business, thereby harming interstate commerce.[4]

---

[3] *See Trinova*, 111 S.Ct. at 835 ("States are free to 'structur[e] their tax systems to encourage the growth and development of intrastate commerce and industry'") (quoting *Boston Stock Exchange v. State Tax Comm'n*, 429 U.S. 318, 324-328 (1977)); *Armco, Inc. v. Hardesty*, 467 U.S. 638, 645-646 (1984).

[4] *See Moorman Mfg. Co. v. Bair*, 437 U.S. 267, 295 (1978) (Powell, J. dissenting). *See also* Note, *State Taxation of Interstate Business and the Multistate Tax Compact: The Search for a Delicate Uniformity*, 11 Colum. J. Law & Soc. Probs. 231, 236-237 and nn.15-16 (1975).

Inconsistent state interests and laws have long stymied attempts to impose federal uniformity in the area of interstate taxation.[5] In the meantime, states have become increasingly aggressive in interstate taxation.[6] However, the unitary business principle has for over a century stood as a protection against such extraterritorial and potentially discriminatory taxation. The State in this case seeks to eviscerate that protection. At the argument in this case, New Jersey for the first time requested that this Court overrule *ASARCO Inc. v. Idaho State Tax Comm'n*, 458 U.S. 307 (1982), and *F.W. Woolworth Co. v. Taxation & Revenue Dep't*, 458 U.S. 354 (1982), on two grounds.[7] Tr. at 31-32. First, the State urged that nondomiciliary states be permitted to apportion the unrelated passive investment income of unitary businesses. Second, New Jersey urged that the unitary business principle be abandoned entirely so that all income may be apportioned by any state in which the overall business conducts any operations. For example, if a corporation with one affiliate manufacturing computers on the East Coast has a wholly separate affiliate operating an amusement park on the West Coast, it may now structure its operations so that there is no relationship, apart from common ownership, between the East Coast affiliate and the West Coast operation. Nonetheless, under New Jersey's argument, the state with the computer business would apportion the income generated from the entire enterprise, despite the complete absence of a connection between that state and the amusement park business.

---

[5] *See, e.g.*, E. Rudolph, *State Taxation of Interstate Business: The Unitary Business Concept and Affiliated Corporate Groups*, 25 Tax L. Rev. 171, 177 (1970).

[6] *See e.g., Quill Corp. v. North Dakota*, No. 91-194 (U.S. cert. granted Oct. 7, 1991).

[7] Although New Jersey did not urge these positions in its initial brief in this Court, the argument was raised by California and eight other states in their brief *amici curiae*. *See* Cal. Am. Br. 20. References herein to "Tr." are to the Transcript of Oral Argument (March 4, 1992).

While states may, consistent with Due Process, look beyond their borders to "get the true values of the things within it," it has long been this Court's position that the Constitution does not permit this authority to "expose the heel of the system to a mortal dart—not, in other words, to open to taxation what is not within the State." *Wallace v. Hines*, 253 U.S. 66, 69 (1920) (Holmes, J.). And as the Court reiterated just two Terms ago in *Trinova Corp. v. Michigan Dep't of Treasury*, 111 S. Ct. at 836, the Constitution is "a defense against state taxes which . . . either give rise to serious concerns of double taxation, or attempt to capture tax revenues that, under the theory of the tax, belong of right to other jurisdictions."

A primary protection in this area has been the unitary business principle, which has long stood as "the linchpin of apportionability. . . ." *Mobil Oil Corp.*, 445 U.S. at 439. The rules with respect to the attribution of income of passive investments have produced a similar, but more limited protection. No one is suggesting that this Court should attempt to issue a uniform state code of taxation, but neither should the Court eviscerate the protection against unfair, burdensome, and discriminatory taxation provided by the unitary business principle and the passive investment rule.

ARGUMENT

I. THE UNITARY PRINCIPLE SHOULD BE PRESERVED, SINCE IT ALLOWS STATES TO REACH THE FULL MEASURE OF THEIR TAXING AUTHORITY WHILE PROVIDING IMPORTANT PROTECTION TO MULTISTATE BUSINESSES.

For a century, the unitary business principle has governed state taxation, serving as both a grant of authority to states to look beyond their borders (in order to value properly the instate activities of a multistate business) and as a bar to taxing values that are unrelated to the instate activities of a business. *See, e.g., General Motors Corp.*

v. Washington, 377 U.S. 436, 439 (1964); *Northwestern States Portland Cement Co. v. Minnesota*, 358 U.S. 450, 460 (1959); *Butler Bros. v. McColgan*, 315 U.S. 501, 508 (1942); *Ford Motor Co. v. Beauchamp*, 308 U.S. 331, 336 (1939); *Hans Rees' Sons, Inc. v. North Carolina*, 283 U.S. 123, 132-133 (1931); *Bass, Ratcliff & Gretton Ltd. v. State Tax Comm'n*, 266 U.S. 271, 282 (1924); *Wallace v. Hines*, 253 U.S. at 69; *Adams Express Co. v. Ohio State Auditor*, 165 U.S. 194, 221-222 (1897); *Adams Express Co. v. Ohio State Auditor*, 166 U.S. 185, 219-224 (1897). However, under New Jersey's broader theory—that the unitary business principle should be eliminated entirely—every operation commonly owned would be treated, for state taxation purposes, as a single unitary business regardless of its relationship to the in-state activities.

The "unitary" concept arose in the late 19th century as a method for valuing transportation and communication systems that traversed state boundaries. The Court recognized that a state could assess a tax by valuing the entire property as a unit and, through application of a formula, determine the taxing state's share of that value. *See, e.g., Pullman's Palace Car Co. v. Pennsylvania*, 141 U.S. 18, 26 ~~(1891);~~ *Western Union Telegraph Co. v. Taggart*, 163 U.S. 1, 18 (1896). This "unit rule" accounted for the fact that through common ownership and use, the true value of the property may exceed the cost of the property itself. *See State Railroad Tax Cases*, 92 U.S. 575, 608 (1876). Thus, the value of the miles of railway track within a state is heightened when that track crosses into a second state. A failure to account for that aspect would result in undervaluing the instate miles of track. As this Court has recognized,

> The only reason for allowing a State to look beyond its borders when it taxes the property of foreign corporations is that it may get the true value of the things within it, when they are part of an organic system of wide extent, that gives them a value above what they otherwise would possess.

Wallace v. Hines, 253 U.S. at 69. At the same time this Court made clear that "[t]he purpose is not . . . to open to taxation what is not within the State. Therefore no property . . . situated [out-of-state] can be taken into account unless it can be seen in some plain and fairly intelligible way that it adds to the value of the [enterprise] and the rights exercised in the State." *Id.*

Although first applied to cases in which physical unity was manifest, the rule was soon applied where only operational, rather than physical, unity was present. *See Adams Express Co.*, 165 U.S. at 220. Although physically unconnected, the value of an express company's property in one state would not be fairly reflected without considering its operational connection to property in other states. The principle was then extended to the income tax calculations for companies operating across state lines. *See United States Glue Co. v. Oak Creek*, 247 U.S. 321, 328-329 (1918).

Translated to the modern enterprise, the unitary business is one in which corporate constituents are involved in an economically functionally-related enterprise. If a corporation's income-producing activity in one state is inextricably linked with its activities in another state, or if the businesses of separate affiliates are intertwined, there is a unitary business. The taxable income is thus apportioned to a state based on the total income produced, without regard to state lines or corporate structure. The requisite unity is, however, more than ownership. "It is a unity of use, not simply for the convenience or pecuniary profit of the owner, but existing in the very necessities of the case—resulting from the very nature of the business." *Adams Express Co.*, 165 U.S. at 222.

Although the unitary business principle is central to this Court's state taxation jurisprudence, New Jersey asks that it be abandoned. The unitary principle, however, ably serves its intended purpose. A state's taxing power must "bear fiscal relation to protection, opportuni-

ties and benefits given by the state." *Wisconsin v. J.C. Penney Co.*, 311 U.S. 435, 444 (1940). Simply put, the state must have given something "for which it can ask return." *Id.* New Jersey has given no insight into the benefits it provides to an out-of-state business having no connection with the State. Given the radical nature of New Jersey's request—wholesale abandonment of a central tenet of constitutional doctrine—it would be expected that New Jersey would show that the unitary system somehow prohibits it from reaching what rightfully belongs to New Jersey. New Jersey has not even suggested, much less made a showing, that the existing unitary structure has deprived it of the ability to capture income that is properly its to tax. Nor has it shown that the unitary principle is unworkable. In short, New Jersey has established no basis for overruling the unitary cases stretching back over a century, and allowing states to sweep within their taxing jurisdiction activities wholly unrelated to instate business.

This improper expansion of state power to tax is of particular concern in those states that require combined reporting.[8] Under combined reporting, the income of

---

[8] A combined report is an "*accounting* method whereby each member of a group carrying on a unitary business computes its individual taxable income by taking a portion of the combined net income of the group." *Caterpillar Tractor Co. v. Department of Revenue*, 618 P.2d 1261, 1263-64 (Ore. 1980) (emphasis in original).

A number of states currently require combined reporting for unitary businesses (*see, e.g.* Arizona, California), while others provide for it under certain circumstances (*see, e.g.*, Michigan, New York). *See* 1 State Tax Guide (CCH) ¶ 10-110 at 1071-1072. Combined reporting may be required by statute, by regulation, or by directive of the taxing authority.

Unlike a combined return, a consolidated return is appropriate for corporate affiliates, all of which are taxable in the state. The separate entities of the various member corporations are disregarded, the consolidated income of the entire group is reported on a single return, and a single tax is paid on that income. Rudolph, 25 Tax L. Rev. at 197.

affiliates that are not taxable in the state are nonetheless included in the determination of an instate corporation's income. Combined reporting requires that the income of a business conducted partly within and partly without the taxing state be determined and apportioned in the same manner regardless of whether the business is conducted by one corporation or by two or more affiliated corporations.[9] If the unitary business principle were abandoned, the state could, through revision or reinterpretation of existing law, require entities engaged in separate businesses that are unrelated except for common corporate ownership to file a single combined return. The state would thus be taxing a business on the income of an affiliated entity engaged in wholly unrelated activities. And, as described below, because of the broad flexibility states currently have with respect to apportionment formulas, *see Moorman Mfg. Co. v. Bair*, 437 U.S. 267, 274 (1978), constitutional restraints on state apportionment provide little, if any, protection against states reaching extra-territorial values. This Court should not thus expand state tax jurisdiction, particularly based on the incomplete record in this case.[10]

II. OVERRULING *ASARCO* AND *WOOLWORTH* TO PERMIT NON-DOMICILIARY STATES TO REACH PASSIVE INVESTMENT INCOME WOULD BE BOTH UNWARRANTED AND DISRUPTIVE.

New Jersey, in a proposal somewhat less radical than abandoning the unitary principle, has alternatively requested that the Court modify the unitary business principle to permit it to reach the income of passive invest-

---

[9] *See* Rudolph, 25 Tax L. Rev. at 197; J. Hellerstein, *State Taxation* ¶ 8.12, at 462-63 n.527 (1983).

[10] Because New Jersey had not raised this claim in any of the prior proceedings, there is an absence of a factual record on this issue, which counsels against this Court addressing it at this juncture.

ments. In so urging, it again asks that this Court overrule past decisions that have provided important limitations on state power to tax.

Historically, States have allocated rather than apportioned the income received by a unitary business from its passive investments.[11] *See Moorman Mfg. Co. v. Bair*, 437 U.S. at 272-73; *National Bellas Hess, Inc. v. Department of Revenue*, 386 U.S. 753, 756 (1967); *Norfolk & Western R. Co. v. Missouri State Tax Comm'n*, 390 U.S. 317, 325 (1868). Like real property, the location of intangible property was considered determinable; therefore, so long as it did not form an "integral part[] of some local business," *Farmers Loan & Trust Co. v. Minnesota*, 280 U.S. 204, 213 (1930), such property was located at the business situs or commercial domicile, and was properly attributable in full to that state. *See Wheeling Steel Corp v. Fox*, 298 U.S. 193 (1936).

Recognizing the appropriateness of this practice, Wisconsin, in creating the modern corporate income tax, provided for apportionment of most income, but retained the allocatation of income derived from passive investments. *See* Wis. Stat. § 1087 m-1 (1911). The 1920 Model Business Income Tax Act adhered to this approach, and by 1940, most states with corporate income taxes did so as well.[12] Adhering to the long-standing practice, the majority of states today allocate passive investment income to the state of domicile,[13] and it is the specified treat-

---

[11] "Allocation" refers to attributing an item of property, income, receipts, and the like to a particular state, based on tracing the source of income to that State. Hellerstein, *State Taxation* ¶ 8.4, at 328 n.95. Where a state "allocates" income, it taxes 100% of that income. In contrast, apportionment is the assignment of that portion of an enterprise's total income that is attributable to the taxing state. *See id.*

[12] *See* L. Silverstein, *Problems of Apportionment in Taxation of Multistate Business*, 4 Tax L. Rev. 207, 210 (1949).

[13] *See* Appendix to Brief of Allied-Signal on Reargument.

ment in the Uniform Division of Income for Tax Purposes Act ("UDITPA"). *See* UDITPA § 1(a) & (e).

This approach comports with longstanding constitutional doctrine developed from the unitary business cases. The Court consistently has found that the Due Process and Commerce Clauses prohibit state taxation absent a minimal connection between the interstate or international activities and the taxing state, and a rational relationship between the income attributed to the state and the intrastate values of the enterprise. *See, e.g., Exxon Corp. v. Department of Revenue*, 447 U.S. 207, 219-20 (1980). The unitary nature of the business supplied the nexus and rational relationship essential to apportionment. As the Court has recognized, "the linchpin of apportionability in the field of state income taxation is the unitary business principle." *Mobil Oil Corp.*, 445 U.S. at 439.

In *ASARCO Inc. v. Idaho State Tax Comm'n*, and *F.W. Woolworth Co. v. Taxation and Revenue Dep't*, this Court made clear that the constitutional limitations preclude states from including in the taxable income of a nondomiciliary parent corporation the passive investment income of subsidiaries that have no other connection with the taxing state. The Court has subsequently reiterated that an exchange of value beyond "the mere flow of funds arising out of a passive investment" is necessary before a state may permissibly tax the out-of-state income from passive, uncontrolled investments of an otherwise unitary business. *Container Corp. of America v. Franchise Tax Bd.*, 463 U.S. 159, 166 (1983).

New Jersey's request that this longstanding approach be reversed raises several problems. To begin with, the gain or loss from passive investments is a product of managerial activities and decision-making occurring in the commercial domiciliary state, not in the state in which, for example, the nondomiciliary corporation operates a manufacturing concern. The intangibles giving rise to dividends are generally acquired, managed, and held at

the taxpayer's headquarters in the state of commercial domicile. While New Jersey may have a relationship to Bendix's organic business activities, New Jersey has not demonstrated that it provides any sort of benefit to or has any nexus with activities generating passive investment income. *See Complete Auto*, 430 U.S. at 279; *Wisconsin v. J.C. Penny Co.*, 311 U.S. at 443.[14]

Additionally, as a practical matter, permitting nondomiciliary states to tax passive investment income will not alleviate any of the complexities that may be encountered in determining taxable income and will, in fact, increase the risk of multiple taxation. States that currently allocate passive investment income of domiciliaries are likely to continue to do so.[15] At the same time, other states could well seek to apportion the identical income.

Finally, New Jersey has not indicated how states would determine their aliquot share of passive investment income. It would, of course, be necessary to determine the proper portion attributable to the unitary business (and the state's share of that amount) and how much instead should be attributed to other entities. But the traditional three-factor apportionment formulation, which is based on the proportion of a unitary business' total payroll, property, and gross receipts located in the taxing state, does not bear any sort of rational relationship to the out-of-state values of intangible income. That formula, widely used today for apportioning the tangible business income

---

[14] The principle of *ASARCO* and *Woolworth* is not designed to protect from apportionment income that is functionally related to an enterprise, but instead income from passive investments. *See Container Corp. of America v. Franchise Tax Bd.*, 463 U.S. 159, 180 n.19 (1983). *Cf. Corn Products Refining Co. v. Commissioner of Internal Revenue*, 350 U.S. 46 (1955).

[15] At the very least, the outcome requested by New Jersey would require the revision of statutes in each state that has adopted UDITPA's distinction between business and nonbusiness (passive) income.

of unitary enterprises, was designed to measure the income arising from tangibles and to "reflect a very large share of the activities by which value is generated." *Container Corp.*, 463 U.S. at 183.

The theory underlying the three-factor formula, and indeed, the basis for its acceptability for Commerce Clause purposes, is that a dollar of payroll or property or a dollar of sales made in one state, produces roughly the same amount of taxable income as a dollar in another state.[16] But this theory makes clear that the factors have virtually no relevance to dividends or to capital gains derived from the sale of stock in an unrelated business.[17] Little of the taxpayer's payroll is required, for example, to collect dividends, nor is there any reason to believe that investment income is related to the states in which goods are sold in the taxpayer's regular course of business operations. Similarly, the amount of tangible property located in the state of manufacturing has no relevance to investment decisions made at corporate headquarters located in a different state.

Overruling *ASARCO* and *Woolworth* would require the Court to reexamine an unbroken line of cases holding that, to meet the constitutional standards, a tax must be "applied to an activity with a substantial nexus with the taxing state." *Complete Auto*, 430 U.S. at 279. It could also create new problems in state taxation, as states with no connection to an out-of-state activity may nonetheless try to reach that activity's income, leading inevitably to multiple taxation and apportionment complications. New Jersey has provided no basis for disrupting the current scheme. Under these circumstances, *ASARCO* and *Woolworth* should be retained.

---

[16] *See* J. Hellerstein & W. Hellerstein, *State and Local Taxation* 577 (5th ed. 1988).

[17] The drafter of UDITPA has acknowledged that the allocation and apportionment sections of the uniform act are "a formula designed for manufacturing and merchandising businesses." W. Pierce, *The Uniform Division of Income for State Tax Purposes*, 35 Taxes 747, 749 (1957).

III. THE COURT SHOULD MAINTAIN STABILITY IN THE AREA OF STATE TAXATION.

The Court has asked whether *ASARCO* and *Woolworth* should be overruled,[18] but the plain fact is that far more is at stake. As noted above, *supra* pp. 5-6, New Jersey's proposal to have this Court abandon the unitary business principle would undermine decades of settled constitutional precedent. Even New Jersey's narrower effort to allow states to apportion passive investment income would force this Court to reassess its settled principles. Under the doctrine of *stare decisis*, a party seeking to have this Court overrule precedent must provide "special justification" [19] for that extraordinary step, and that is sorely lacking in this case.

---

[18] *See* Order in No. 91-615 (March 11, 1992) ("Order").

[19] *Arizona v. Rumsey*, 467 U.S. 203, 212 (1984). "[*S*]*tare decisis* is a basic self-governing principle within the Judicial Branch, which is entrusted with the sensitive and difficult task of fashioning and preserving a jurisprudential system that is not based upon 'an arbitrary discretion.'" *Patterson v. McLean Credit Union*, 491 U.S. 164, 172 (1989) (quoting The Federalist, No. 78, at 490 (A. Hamilton) (H. Lodge ed. 1888)). *See also Payne v. Tennessee*, 111 S. Ct. 2597, 2609 (1991); *Welch v. Texas Dep't of Highways and Public Transportation*, 483 U.S. 468, 494 (1987) ("the doctrine of *stare decisis* is of fundamental importance to the rule of law"). While *stare decisis* has almost invincible force in statutory cases (*Monell v. Department of Social Services*, 436 U.S. 658, 695 (1978)), in constitutional cases as well, "[t]here is a strong public interest in stability, and in the orderly conduct of our affairs, that is served by a consistent course of constitutional adjudication." *Thornburgh v. American College of Obstetricians and Gynecologists*, 476 U.S. 747, 780-81 (1986) (Stevens, J., concurring). Thus, in constitutional cases, special justification is required before this Court will overrule precedent. *See Rumsey*, 467 U.S. at 212; *City of Akron v. Akron Center for Reproductive Health, Inc.*, 462 U.S. 416, 419-20 (1983).

A. Considerations of *Stare Decisis* Counsel Adherence to this Court's Decisions.

In determining whether to break with past decisions, this Court has utilized a variety of considerations, each of which suggest that *ASARCO* and *Woolworth* should be reaffirmed. *ASARCO* and *Woolworth* were decided not through incomplete analysis, but after extensive briefing both by the parties themselves and *amici* representing different perspectives on the issues. *Cf., e.g., Copperweld Corp. v. Independence Tube Corp.*, 467 U.S. 752, 766 (1984). Neither the law nor the factual context has changed in the decade since those decisions were rendered: this Court invoked *ASARCO* and *Woolworth* a year later in *Container* and has not given any indication that the unitary business principle, as applied in those decisions, no longer limits state taxation consistent with Due Process. *Cf., e.g., Goodman v. Lukens Steel Co.*, 482 U.S. 656, 659-62 (1987); *Patterson v. McLean Credit Union*, 491 U.S. 164, 173 (1989). Thus, this Court should not lightly upset this area of the law. A number of additional considerations suggest that *stare decisis* interests have particular weight in this case.

First, the sheer magnitude of New Jersey's proposed change counsels particular caution. New Jersey's suggestion that this Court abandon the unitary business principle would put in question literally dozens of this Court's precedents, all of which were grounded on the fact that a state may include out-of-state values in its computation of tax only when they are related to a unitary business that is carried on in the taxing state. *See, e.g., Exxon*, 447 U.S. at 219-220.

Even if the Court were to accept New Jersey's narrower proposition and hold that passive investment income is apportionable, the change would be profound. In addition to overruling *ASARCO* and *Woolworth*, the Court would also have to resolve the inconsistency of its new holding with decisions—especially *Mobil* and *Exxon*

—that preceded and forecast the *ASARCO* and *Woolworth* holdings. *See ASARCO*, 458 U.S. at 315 (noting reliance on *Mobil*); *Woolworth*, 458 U.S. at 362 (noting reliance on *Mobil* and *Exxon*).[20]

Second, it is hardly surprising that businesses have planned their tax and economic affairs according to the unitary business principle, filing their tax returns in various jurisdictions in reliance on this Court's settled law. Reliance interests always require this Court to reassess precedents with caution,[21] but stability and predictability are especially important for business decision-making. "Considerations in favor of *stare decisis* are at their acme in cases involving property and contract rights, where reliance interests are involved . . . ." *Payne v. Tennessee*, 111 S. Ct. 2597, 2610 (1991).[22] Businesses

---

[20] In addition, most states would have to rework their taxation schemes which, modeled after UDITPA, rest on the distinction between business and nonbusiness income. *See supra* p. 10.

[21] *See, e.g., Monell v. Department of Social Services*, 436 U.S. at 700.

[22] The core of *stare decisis* is that the principle furthers "the stability and predictability required for the ordering of human affairs over the course of time." *Williams v. Florida*, 399 U.S. 78, 127 (1970) (Harlan, J., concurring in part and dissenting in part). *Stare decisis* ensures that "the law will not merely change erratically," and "permits society to presume that bedrock principles are founded in the law rather than in the proclivities of individuals." *Vasquez v. Hillery*, 474 U.S. 254, 265 (1986). It "embodies an important social policy. It represents an element of continuity in law, and is rooted in the psychologic need to satisfy reasonable expectations." *Helvering v. Hallock*, 309 U.S. 106, 119 (1940). Among the "weighty considerations" that "underlie the principle that courts should not lightly overrule past decisions," most important is enabling individuals "to plan their affairs with assurance against untoward surprise . . . ." *Moragne v. States Marine Lines, Inc.*, 398 U.S. 375, 403 (1970). "When rights have been created or modified in reliance on established rules of law, the arguments against their change have special force." *Thomas v. Washington Gas Light Co.*, 448 U.S. 261, 272 (1980).

carefully tailor their operations to this Court's decisions.[23] Where businesses have justifiably relied on precedent, overruling severely disrupts business planning and operation. Businesses have relied on *ASARCO* and *Woolworth* for a decade, and those reliance interests would be frustrated by this Court's overruling. *Cf., e.g., Monell v. Department of Social Services*, 436 U.S. 658, 700 (1978). Thus, as this Court has noted:

> Judicial decisions affecting the business interests of the country should not be disturbed except for the most cogent reasons, certainly not because of subsequent doubts as to their soundness. The prosperity of a commercial community depends, in a great degree, upon the stability of the rules by which its transactions are governed.[24]

Maintaining stability in this area is particularly appropriate because any change would affect the tax consequences of past conduct.[25] Businesses have filed their tax returns in reliance on the unitary business principle generally, and on the Court's holdings in *ASARCO* and *Woolworth* that passive investment income that is unrelated to a company's unitary business in a taxing jurisdiction may not be apportioned by that state. Any change in this area

---

[23] *See, e.g.,* W. Knepper, *Liability of Corporate Officers and Directors* § 14.02 at 418 (3d ed. 1978); J. Ayre, *Corporate Legal Departments: Strategies for the 1980s* 93 (1984).

[24] *National Bank v. Whitney*, 103 U.S. 99, 102 (1880). *See also, e.g., Walling v. Halliburton Oil Well Cementing Co.*, 331 U.S. 17, 25-26 (1947) (because of continued recognition of the precedent by the Court, Congressional acquiescence in the decision, and reliance by business, the Court notes that "[e]ven if we doubted the wisdom of [the precedent] as an original proposition, we should not be inclined to depart from it at this time").

[25] "Because it forces us to consider the disruption that our new decisional rules cause, retroactivity combines with *stare decisis* to prevent us from altering the law each time the opportunity presents itself." *James B. Beam Distilling Co. v. Georgia*, 111 S.Ct. 2439, 2450 (1991) (Blackmun, Marshall, and Scalia, JJ., concurring in the judgment).

could impose substantial retroactive tax liabilities.[26] The Court has been especially hesitant to impose such tax liabilities, recognizing that retroactive surprises in the area of taxation are particularly unfair. *See, e.g., Helvering v. Griffiths*, 318 U.S. 371, 402-03 (1943). Thus, under the circumstances, *stare decisis* counsels the Court to reject New Jersey's proposals to unsettle the constitutional principles governing taxation of multistate enterprises.

Third, the unitary business principle as articulated and applied in *ASARCO* and *Woolworth* provides a far more workable standard for judging states' ability to impose tax obligations than any other alternative measure of Due Process nexus. *Cf., e.g., Swift & Co. v. Wickham*, 382 U.S. 111, 124-25 (1965). In fact, New Jersey has found the passive investment rule to be "workable," providing a "bright line" for businesses and taxing authorities. Tr. at 40. Thus, contrary to Justice O'Connor's concerns, there is no indication that *ASARCO* and *Woolworth* have created "staggering practical difficulties for taxpayers, state tax administrators, and ultimately, the courts." *ASARCO*, 458 U.S. at 348 (O'Connor, J., dissenting). In all events, adopting an alternative standard would create additional complexities and force this Court to scrutinize apportionment rules more closely. *See infra* pp. 24-30.

The same concerns that drive *stare decisis* also strongly counsel that, if the Court either abandons the unitary business principle or allows states to apportion unrelated passive investment income, such a decision be only prospective in application. Under *Chevron Oil Co. v. Huson*, 404 U.S. 97 (1971), the Court may limit the retroactive effect of a decision if the case meets three criteria: (1) the decision "establish[es] a new principle of law, either by overruling clear past precedent on which litigants may have

[26] States have varying, but nonetheless in some instances lengthy, limitations periods for assessment of additional taxes. *See, e.g.*, Cal. Rev. & Tax Code § 25663 (West 1979 & Supp. 1992) (four years). *See supra* n.25.

relied, . . . or by deciding an issue of first impression whose resolution was not clearly foreshadowed"; (2) the Court has "weigh[ed] the merits and demerits . . . by looking to the prior history of the rule in question, its purpose and effect, and whether retrospective operation will further or retard its operation"; and (3) the Court has "weighed the inequity imposed by retroactive application" and found that the new ruling "could produce substantial inequitable results if applied retroactively . . . ." *Id.* at 106-07 (citations omitted).

Amici have already demonstrated that this case satisfies the first prong of *Chevron Oil.* As shown above, the unitary business principle has been applied for a century, and the Court has never forecast *any* retreat from that principle. *See supra* pp. 5-6. *ASARCO* and *Woolworth* were merely correct applications of the Court's longstanding unitary business precedents, consistent with the statutes of most states (*supra* p. 10), and those decisions have not been questioned in the decade since they were announced. Thus, the abandonment or significant restriction of the unitary business principle would pose a clear and unpredictable break with the past.

This case also satisfies the second prong of *Chevron Oil,* because the policies behind any change in this Court's settled law would not be furthered by applying the decision retroactively. New Jersey appeared to advance two arguments in favor of change: states are entitled to more revenues than they currently receive from multi-state businesses, Tr. at 40; and the unitary business principle is unworkable, Tr. at 32-33, 38. Concerning the first argument, the State has conceded that its theory is at least "in considerable tension with" controlling law; thus, states are hardly entitled to retroactive revenues as a matter of fairness, since they are currently not entitled to those revenues at all. Regarding the second, as discussed earlier, *amici* simply disagree that the unitary business principle is unworkable (*supra,* p. 18), but even if this interest were legitimate, it would not justify imposing

retroactive liabilities on businesses that gauged their tax liabilities by *ASARCO*, *Woolworth*, and the unitary business principle during the past decade.

Finally, this case also satisfies the third prong of *Chevron Oil*, because retroactive application of any overruling decision would penalize businesses for having filed their tax returns for the past ten years in reliance on *ASARCO* and *Woolworth*. *Supra* p. 17. Thus, businesses might be forced not only to pay back taxes on vastly expanded tax bases but also interest and penalties for not having predicted this Court's overruling of settled precedent.

B. The Failure of Congress To Legislate in this Area also Counsels this Court Not To Overrule *ASARCO* and *Woolworth*.

This Court has repeatedly noted that it is institutionally unable to fashion a system of equitable rules of state taxation.[27] However, Congress has chosen not to act in this area. As a result, the Court's state taxation decisions have taken on added significance, providing businesses with the sole indications of how far states may permissibly reach in taxing multistate and multinational enterprises. Those decisions do not, however, preclude Congress from enacting a comprehensive system of state taxation.

Constitutional cases involving interstate taxation are not insulated from Congressional overruling simply because they may be grounded in Due Process concerns. In acting under its Commerce Clause authority, Congress could at the same time eliminate the Due Process problems. First, this Court noted in *ASARCO* itself that states are bound by Due Process jurisdictional requirements that do not apply to the federal government, which may

---

[27] *See, e.g., Moorman Manufacturing Co. v. Bair*, 437 U.S. at 278-280.

act without regard to state boundaries. *See ASARCO*, 458 U.S. at 327-328 n.23. If states were utilized as agents for Congressional action, they would be insulated from the Due Process challenge that they are overreaching their geographical jurisdiction in taxing values of multistate entities.[28] Second, Congress would be able to fashion uniform apportionment rules which could alleviate the burdens of multiple taxation that result from state legislation in this area. *See, e.g., Commonwealth Edison Co. v. Montana*, 453 U.S. 609, 628 (1981); *Northwestern States Portland Cement Co. v. Minnesota*, 358 U.S. at 476; *McCarroll v. Dixie Greyhound Lines, Inc.*, 309 U.S. 176, 188-189 (1940) (Black, Frankfurter, and Douglas, J.J., dissenting).

The unitary business principle, and cases like *ASARCO* and *Woolworth* that have applied it, are therefore entitled to strong deference because "correction can be had by [federal] legislation." [29] Here, as in statutory cases, Congress can make any necessary change "with infinitely less derangement of those interests than would follow a new ruling of the court, for statutory regulations would operate only in the future." *Whitney*, 103 U.S. at 102.

Congress remains the proper forum for addressing states' concerns about their ability to raise revenue and businesses' justified fears about multiple taxation. There, the question of how much burden on interstate commerce should be tolerated in light of state fiscal concerns can be addressed based on a complete factual record, important competing policies can be weighed, and multiple burdens could be avoided. If Congress were persuaded to

---

[28] *See* P. Hartman, *Collection of the Use Tax on Out-of-State Mail Order Sales*, 39 Vand. L. Rev. 993, 1017-1028 (1986).

[29] *Burnet v. Coronado Oil & Gas Co.*, 285 U.S. 393, 406 (1932) (Brandeis, J., dissenting) (citation omitted). *See also, e.g., Monell v. Department of Social Services*, 436 U.S. at 695; *United States v. South Buffalo R. Co.*, 333 U.S. 771, 774 (1948); *Continental T.V., Inc. v. GTE Sylvania Inc.*, 433 U.S. 36, 60 (1977) (White, J., concurring).

act, it could do so prospectively, to avoid upsetting reliance interests, and could implement changes using a phase-in period that would not suddenly impose new tax burdens on businesses. Unless that occurs, this Court's settled law in the area of state taxation should not be disturbed.[30]

IV. IF THIS COURT ABANDONS THE UNITARY BUSINESS PRINCIPLE, IT SHOULD REQUIRE THAT STATES ENGAGE IN FAIR APPORTIONMENT.

The Court has requested briefing on "what constitutional principles should govern state taxation of corporations doing business in several states" if *ASARCO* and *Woolworth* were overruled. *See* Order. This section addresses principles that should guide the Court if it either were to allow apportionment by states of a company's unrelated passive investment income, or were to go further and actually abandon the unitary business principle. In either case, this Court's current standards should be reevaluated.

This Court has long refused to closely scrutinize state apportionment rules, despite candid acknowledgment that those rules are merely rough estimates of the true taxable value of an interstate company's activity in a taxing state. *See, e.g., Amerada Hess Corp. v. Director, N.J. Div. of Taxation*, 490 U.S. 66, 74-75 (1989). Instead, apportionment rules have been upheld if they are merely "internally" and "externally" consistent. *Trinova*, 111 S. Ct. at 832. But neither test, as presently implemented, provides adequate protection of interstate commerce if state tax jurisdiction is expanded as New Jersey urges here.

The "internal consistency" test does not adequately identify impermissible multiple taxation burdens imposed

[30] We note that many of the same issues concerning the preservation of existing authority are presented in *Quill Corp. v. North Dakota*, No. 91-194.

on interstate businesses. That test merely requires that a formula "be such that, if applied by every jurisdiction, it would result in no more than all of the unitary business' income being taxed." *Trinova*, 111 S. Ct. at 832 (quoting *Container*, 463 U.S. at 169). Under this abstract test, even a state allocation rule applied to income that every other state is apportioning might pass constitutional muster.

The "external consistency" test is similarly inadequate to protect interstate commerce from undue and discriminatory burdens. The Court has repeatedly stated that, in order to successfully challenge a state statute on "external consistency" grounds, the *taxpayer* "must prove by clear and cogent evidence that the income attributed to the State is in fact out of all apropriate proportions to the business transacted . . . in that State, or has led to a grossly distorted result." *Trinova*, 111 S. Ct. at 832 (internal citations and quotation marks omitted). *Accord*, *Container*, 463 U.S. at 170; *Moorman*, 437 U.S. at 274; *Norfolk & Western R. Co.*, 390 U.S. at 326; *Hans Rees' Sons*, 283 U.S. at 135. But while the Court has repeatedly concluded that taxpayers have not met their burden of proving unfairness, the Court has not provided any guidance to businesses on how a showing of external *in*consistency could be made. *See, e.g.*, *Trinova*, 111 S. Ct. at 834; *Moorman*, 437 U.S. at 275. And given this Court's repeated criticisms of separate or geographic accounting,[31] it is difficult to understand how a company could prove that a state formula is, in fact, "captur[ing] tax revenues that, under the theory of the tax, belong of right to other jurisdictions." *Trinova*, 111 S. Ct. at 836.

If the Court were to overrule *ASARCO* and *Woolworth* and hold that a company's passive investment income could be apportioned to one or more of its unitary busi-

---

[31] *See, e.g.*, *Trinova*, 111 S. Ct. at 829-30; *Container*, 463 U.S. at 181; *Mobil*, 445 U.S. at 438.

nesses, the Court should recognize that allocation of passive investment income by a domiciliary state could no longer survive constitutional scrutiny. *Supra* n.20. This holding follows necessarily from the Court's longstanding recognition that if one jurisdiction allocates what other jurisdictions apportion, multiple taxation would inevitably arise. "The corollary of the apportionment principle, of course, is that no jurisdiction may tax the instrumentality in full." *Japan Line, Ltd. v. County of Los Angeles*, 441 U.S. 434, 447 (1979). *See Standard Oil Co. v. Peck*, 342 U.S. 382, 384-85 (1952). Furthermore, the Court should require that states develop reasonable rules to attribute a given company's passive investment income to its various unitary businesses. Otherwise, multiple taxation of this income would inevitably occur. *See supra* p. 12.

If the Court were to actually abandon the unitary business principle, the Court would be forced to reassess even more fundamentally the principles it uses in evaluating state apportionment statutes. Since the "internal consistency" test does not adequately protect businesses against undue and discriminatory burdens, the Court's reevaluation should focus on "external" consistency.

The Court should be more sensitive to apportionment rules that may be unfair because they impose discriminatory burdens on out-of-state businesses.[32] Because of fed-

---

[32] Alternatively, the Court could rely on the non-discrimination prong of *Complete Auto Transit, Inc. v. Brady*, 430 U.S. 274, 279 (1977). "Even if a tax is fairly apportioned, it may discriminate against interstate commerce." *Amerada Hess*, 490 U.S. at 75. While a tax statute may be invalidated if it is facially discriminatory, *Westinghouse Electric Corp. v. Tully*, 466 U.S. 388, 398-99 (1984), *Amerada Hess*, 490 U.S. at 75, or if it fails the internal consistency test, *Tyler Pipe Industries, Inc. v. Washington Dep't of Revenue*, 483 U.S. 232, 247-48 (1987), *Armco Inc. v. Hardesty*, 467 U.S. at 644-45, those notions do not exhaust this Court's inquiry.

Under the Court's settled law, a state tax statute is also unconstitutional if it unjustifiably "favor[s] local commercial interests

eral law,[33] most interstate tax cases are litigated in state courts, which may not be as sensitive to discrimination against out-of-state companies. Thus, this Court should be alert to the very real possibility that out-of-state businesses may be unfairly treated relative to their instate competitors.[34] The Court should be willing to evaluate whether a state's taxing formula takes into account factors that are not reasonably aimed at determining the true value of a multistate enterprise attributable to a given state,[35] particularly when a company provides evidence that the formula benefits intrastate commerce at the expense of outsiders, or creates coercive incentives for businesses to relocate to a state.[36]

The Court should also take a closer look at state departures from the statutory approaches of other states, to determine whether these "outliers" impose special bur-

---

over out-of-state businesses," *Boston Stock Exchange v. State Tax Comm'n*, 429 U.S. at 335, or if there is evidence of a state's "intent to confer a benefit upon local industry not granted to out-of-state industry," *Amerada Hess*, 490 U.S. at 76; *Bacchus Imports, Ltd. v. Dias*, 468 U.S. 263, 270-71 (1984). Furthermore, this Court has invalidated state statutes that have "a discriminatory effect by exerting an inexorable hydrolic pressure on interstate businesses to ply their trade within the State that enacted the measure rather than among the several States. . . ." *Amerada Hess*, 490 U.S. at 76 (internal quotations and citations omitted); *see, e.g., American Trucking Ass'ns, Inc. v. Scheiner*, 483 U.S. 266 (1987); *Nippert v. Richmond*, 327 U.S. 416 (1946). Nor will the Court countenance tax statutes that are facially neutral, but nevertheless "in their practical operation [work] discriminatorily against interstate commerce to impose upon it a burden, either in fact or by the very threat of [their] incidence." *Id.* at 425.

[33] 28 U.S.C. § 1341 (1988).

[34] *Cf. Moorman*, 437 U.S. at 289 (Powell, J., dissenting).

[35] *Wallace v. Hines*, 253 U.S. 66 (1920); *Union Tank Line Co. v. Wright*, 249 U.S. 275 (1919); *Fargo v. Hart*, 193 U.S. 490 (1904); *Southern Ry. Co. v. Kentucky*, 274 U.S. 76 (1927).

[36] *See Moorman*, 437 U.S. at 289 (Powell, J., dissenting).

dens on interstate commerce. Although, for example, this Court in *Moorman*, 437 U.S. 267, upheld Iowa's single-factor apportionment formula against a challenge that the State's unusual rule created undue and discriminatory burdens on interstate commerce, the approach taken by that decision would have to be reevaluated in the context of expanded state tax jurisdiction. If this Court were to abandon the unitary business principle, inconsistent apportionment formulas, which "ordinarily result in multiple taxation of corporate net income," [37] would impose even greater burdens on interstate commerce because states would be applying those inconsistent formulas to expanded tax bases. Where a taxpayer demonstrated that an apportionment formula's inconsistency with the formulas of other states raised a risk of burden on interstate commerce, the state should have to provide evidence justifying its unusual statute.[38]

The Court's analysis of fairness should also include whether the state has been consistent with respect to a particular taxpayer over time. States have incentives to manipulate their statutes to garner the greatest possible net revenues, by expanding taxpayers' apportionable income and denying deductions to taxpayers. States should be required to be consistent in their application of formulae to taxpayers and in their definition of a company's taxable activity in the state. Currently, most state statutes allow taxing authorities great discretion to vary the treatment of taxpayers on an *ad hoc basis*.[39] This untram-

---

[37] *General Motors Corp. v. District of Columbia*, 380 U.S. 553, 559 (1965).

[38] *Cf., e.g., Bibb v. Navajo Freight Lines, Inc.*, 359 U.S. 520 (1959) (state had burden to justify law regulating mudguards on trucks, which was inconsistent with the laws of a great many other states).

[39] Indeed, UDITPA provides the language utilized in most state statutes that permits deviations from state laws: "if the allocation and apportionment provisions of [the state statutes] do not fairly represent the extent of the taxpayer's business activity in

meled discretion poses a substantial risk of arbitrary results. Thus, the Court should consider whether states are applying their statutes in an inconsistent manner, including: whether the state has varied the formula applied to a taxpayer from year to year, so as to achieve markedly different results; whether the tax base derived through apportionment varies substantially from year to year, without similar variations in the company's operations or revenues;[40] and whether the state has "evaluate[d] the entire enterprise in a consistent manner," including allowing taxpayers the option of combined returns and combined apportionment if the state has included dividend income in the taxpayer's tax base.[41]

---

this state," the income apportionment method may be altered. *See, e.g.*, Maryland, Md. Code Ann. Tax-General § 10-402(a) (1988 & Supp. 1991); Montana, Mont. Code Ann. § 15-31-312 (1991); New Jersey, N.J. Stat. Ann. § 54:10A-8 (West 1986); Oregon, Or. Rev. Stat. § 314.670 (1991).

Consistently with these provisions, state courts have affirmed that "[a] tax authority may modify past practices to the disadvantage of a taxpayer if it is determined that the former practice was incorrect . . . even though it may result in the subjection of identical transactions occurring at different times to different tax treatment." *Amerada Hess Corp. v. Conrad*, 410 N.W. 2d 124, 134 (N.D. 1987). *See, e.g., True v. Heitkamp*, 470 N.W. 2d 582 (N.D. 1991); *Twentieth Century-Fox Film Corp. v. Department of Revenue*, 700 P.2d 1035 (Or. 1985).

Some courts have acknowledged that if deviations from taxing statutes are permitted on a case-by-case basis, however, "[u]niformity would suffer because of the different attitudes of tax administrators both within [the state] and among all UDITPA states. Differing standards for different years and in the several states are almost certain to obtain." *Id.* at 1041. As a result, some state courts are requiring that modifications be made only through regulation. *See, e.g., Fort Howard Paper Co. v. Oklahoma Tax Comm'n*, 792 P.2d 87 (Okla. App. 1989); *CBS Inc. v. Comptroller of the Treasury*, 575 A.2d 324 (Md. 1990).

[40] *See Norfolk & Western R. Co. v. Missouri State Tax Comm'n*, 390 U.S. at 322.

[41] *Mobil*, 445 U.S. at 461 (Stevens, J., dissenting). *See Container*, 463 U.S. at 168 n.5.

In sum, if this Court were to upset its settled precedent and expand state taxing jurisdiction, it should reevaluate whether its remaining precedents afford interstate commerce sufficient protection against undue and discriminatory state taxation.

CONCLUSION

The Court should retain *ASARCO* and *Woolworth* and not abandon the unitary business principle.

Respectfully submitted,

TIMOTHY B. DYK
Counsel of Record
BETH HEIFETZ
EDWARD K. BILICH
JONES, DAY, REAVIS & POGUE
1450 G Street, N.W.
Washington, D.C. 20005-2088
(202) 879-3939

DAVID E. COWLING
JONES, DAY, REAVIS & POGUE
2300 Trammell Crow Center
2001 Ross Avenue
Dallas, Texas 75201
(214) 220-3939
Counsel for Amici Curiae

April 10, 1992